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① A  
SS

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

DMR

JEFFREY V. COMMISSO,

Plaintiff,

v.

THOMAS WHITELAW LLP, JOSEPH

E. THOMAS, and DOES 1 to 20

inclusive

Defendants

C 12 5867

No.

**COMPLAINT FOR**

- 1. Breach of Contract-  
Employment Agreement**
- 2. Violations of Cal. Labor  
Code §§ 201, 227.3**
- 3. Violations of Cal. Labor  
Code § 203**

**DEMAND FOR JURY TRIAL**

**GENERAL ALLEGATIONS**

1. Plaintiff, Jeffrey V. Commisso, (hereinafter referred to as "Commisso") is a natural person who resides and is domiciled in the State of Minnesota. Before July 2012, Commisso was a resident of California. Commisso is a lawyer licensed to practice in California and Minnesota.

2. On information and belief, Defendant Thomas Whitelaw is a partnership of lawyers with its principal place of business in California. On information and belief, Thomas

1 Whitelaw has also been known as Thomas, Whitelaw & Katz LLP; Thomas Whitelaw, LLP; and  
2 Thomas Whitelaw & Tyler, LLP. (Notwithstanding the other names, Defendant will be referred  
3 to as “the Thomas Whitelaw firm” or “the firm”). The Thomas Whitelaw firm maintains offices  
4 in San Francisco, California.

5 3. On information and belief, although the Thomas Whitelaw firm holds itself out as  
6 a limited-liability partnership, at all times relevant to this dispute it has not registered with  
7 California Secretary of State or with the State Bar of California in violation of Rules of the State  
8 Bar, Rule 3.174; Corporations Code § 16953 et seq.; and Business & Professions Code § 6174.  
9 Consequently, pursuant to Cal. Corporations Code § 16306, the Thomas Whitelaw firm’s equity  
10 partners are subject to individual liability for the wrongs described in this complaint. On  
11 information and belief, all of the Thomas Whitelaw firm’s current and former partners are  
12 domiciled in California.

13 4. Defendant Joseph E. Thomas (“Thomas”) is a natural person. On information  
14 and belief, Thomas is a lawyer licensed to practice in California and he is, and at all times  
15 mentioned was a resident of, and was domiciled in, California. On information and belief,  
16 Thomas is a partner who holds the largest percentage of equity and voting power of the Thomas  
17 Whitelaw firm.

18 5. Plaintiff does not know the true names or capacities of defendants sued as DOES  
19 1 through 20, inclusive. Consequently, Commisso sues these defendants by the fictitious names  
20 DOES 1 through 20. When Plaintiff learns the names and capacities of any such defendant, he  
21 will amend this complaint to allege those defendants’ true name and capacities.

22 6. On information and belief, Plaintiff alleges that all defendants are, in some  
23 manner, partially or equally responsible for the acts and omissions that caused his injuries and  
24 damages as alleged in this complaint.

25 7. On information and belief, at all times each defendant was the *alter ego*, joint  
26 venture, agent, servant, employee, partner, or surety of the other defendants and was acting  
27 within the scope of such venture, agency, employment, partnership, or suretyship, with the  
28 knowledge, consent, or ratification of each of the other defendants in doing the things alleged in

1 this complaint. On information and belief, and in the alternative, where any defendant was  
 2 acting outside the scope of such venture, agency, employment, partnership, or suretyship, or  
 3 without the knowledge, consent, or ratification of the other defendants in doing the things  
 4 alleged he is personally liable for doing the things alleged in this complaint. This complaint  
 5 refers to all defendants named herein collectively as "Defendants" or "the Firm".

## 6 JURISDICTION AND VENUE

7 8. This Court has original jurisdiction under 28 U.S.C. § 1332, in that it is a civil  
 8 action between citizens of different states and the amount in controversy exceeds \$75,000,  
 9 exclusive of interest and costs.

10 9. Venue is proper in this judicial district under 28 USC § 1391(b) because a  
 11 substantial part of the events or omissions giving rise to the claims alleged occurred in the  
 12 County of San Francisco. Venue is proper in this division under Local Rule 3-2(c) for the same  
 13 reason.

## 14 FACTS GIVING RISE TO COMPLAINT

### 15 **Commisso's Agreement with the Thomas Whitelaw firm.**

16 10. Brian D. Henri ("Henri") is a natural person. On information and belief, Henri is  
 17 (or was) a partner of the Thomas Whitelaw firm but holds (or held) no equity. Nevertheless at  
 18 all times relevant to this complaint, Henri was the managing partner of the firm's San Francisco  
 19 office.

20 11. On September 30, 2010, Commisso spoke with Thomas and Henri by telephone.  
 21 During this call, Thomas, acting in his capacity as a partner of the Firm, offered to employ  
 22 Commisso with the title of "non-equity partner" starting October 11, 2011. As part of the offer,  
 23 Thomas promised to employ Commisso at an annual base salary as consideration for  
 24 Commisso's services. Separate and distinct from the term of consideration, Thomas promised  
 25 that Commisso would have an annual target of approximately 1,800 recorded hours. Thomas  
 26 promised that the Firm would pay consideration to Commisso for his employment in the  
 27 following form: (i) a monthly draw; and (ii) a year-end distribution. And Thomas promised that  
 28 the Firm paid distributions every "six or nine months;" that the 1,800 hour target was not rigid;

1 and that there would be additional compensation for hours recorded in excess of the 1,800-hours  
2 target. Thomas also represented to Commisso that the Firm was growing; the Firm management  
3 was "transparent;" Commisso would "be treated like every other partner;" and that, in time,  
4 Commisso could become an equity partner. Commisso did not immediately accept the  
5 employment offer, but asked to consider it and get back to Thomas and Henri.

6 12. On or about October 1, 2010, Commisso telephoned Henri to discuss the Firm's  
7 employment offer. Commisso asked Henri how the Firm would calculate and pay the  
8 distribution. Henri confirmed that the distribution would be paid, *pro rata*, based on hours  
9 recorded. Henri also explained that the hours-recorded-per-year target would be based on  
10 Commisso's employment anniversary with the Firm. Commisso also asked Henri how the Firm  
11 would compensate Commisso for new business that Commisso brought in to the Firm. Henri  
12 assured Commisso that "Thomas will be fair" and pay a reasonable amount for such business.  
13 Based on Thomas's and Henri's promises and representations, Commisso accepted the Firm's  
14 oral employment offer.

15 13. On October 4, 2010, Henri telephoned Commisso and asked Commisso to start  
16 work on October 6 instead of October 11. As a result, Commisso started working for the Firm  
17 on October 6, 2010, in its San Francisco, California, office.

18 14. On information and belief, the Firm has a written partnership agreement. But  
19 Commisso has never signed, been asked to sign, or even seen any such an agreement.

20 **October 2010 to October 2011**

21 15. In November or December 2010, Commisso spoke with Henri by telephone.  
22 During this conversation, Henri told Commisso that everyone was pleased with Commisso's  
23 work. Henri also said that he and Thomas were impressed by Commisso's initial business-  
24 development efforts, which Henri said were "unnecessary."

25 16. Two or three times between October 2010 and October 2011, Henri told  
26 Commisso that the firm was doing "great," that he'd asked "the partners" about Commisso's  
27 work and that "the partners" felt that Commisso was doing a "great job."

28 17. Although Thomas promised as part of the oral employment agreement that

1 Commisso would be a “partner,” Commisso was a mere employee. Commisso’s compensation  
2 was not tied to profit or loss. Commisso was never given any financial information about the  
3 firm; he was never asked or allowed to vote on any issue; his input was never solicited on any  
4 issue; and he was never given an ownership interest in the Firm. Moreover, Commisso had to  
5 obtain authorization to purchase supplies, such as books or on-line resources.

6 18. On information and belief the Thomas Whitelaw firm has a pattern and practice  
7 of mischaracterizing at-will employees as “non-equity partners” to avoid expenses, e.g., state  
8 and federal taxes, SSI withholding, workers-compensation insurance and other benefits.  
9 Between October 2010 and February 2012, a half dozen of the Firm’s attorneys were either fired  
10 or left the Firm’s employ on their own.

#### 11 **Thomas Whitelaw Refuses to Pay Commisso**

12 19. On October 6, 2011, Commisso completed his first year of work for the Firm. At  
13 this point the Firm should have paid him his distribution for the 2010–2011 year per the terms of  
14 the oral employment agreement. However, the Firm did not pay Commisso his distribution.

15 20. On October 24, 2011, Commisso sent Thomas an e-mail about (i) Commisso’s  
16 2010–2011 distribution; and (ii) Commisso’s compensation/billable-rate for 2011–2012. With  
17 respect to the distribution, Commisso asked for his *pro rata* payment based on the billable hours  
18 he recorded. Thomas did not respond to this e-mail. On November 7 and 16, 2011, Commisso  
19 sent Thomas follow-up e-mails about these subjects. Again, Thomas did not respond.

20 21. On November 28, 2011, Commisso met with Thomas in Thomas’s office. During  
21 this conversation, Thomas explained that the Firm would likely not increase Commisso’s  
22 compensation for 2011–2012; that Commisso’s employment at the firm was no different from “a  
23 fourth-year associate;” and that Commisso was as fungible to the Firm as Thomas’s gardener  
24 was to him. Still, Thomas agreed that the Firm owed Commisso a distribution. Prior to  
25 authorizing payment of the distribution, Thomas indicated that he needed to “check the  
26 numbers” before he could authorize payment. Thomas promised to get back to Commisso the  
27 next week.

28 22. On November 30 and December 9, 2011, Commisso sent Thomas further e-mails

1 following up on the November 28, 2011, meeting. Thomas did not respond to these e-mails until  
2 December 12, 2011, when Thomas scheduled a telephone call for the next day. However,  
3 Thomas did not call the next day.

4 23. On December 14, 2011, Thomas and Commisso spoke by telephone. Commisso  
5 asked Thomas whether he agreed that the Firm should pay Commisso's distribution. Thomas  
6 said "yes, pro rata," but again said that he wanted to look at the numbers. Thomas promised to  
7 get back to Commisso the next week. Within minutes of termination of the call with Thomas,  
8 Commisso sent Thomas copies of e-mails from the Firm's internal accounting staff that  
9 identified Commisso's recorded billable hours for the 2010-2011 year as well as Commisso's  
10 client revenue for the same term. The hours billed by Commisso entitled him to a *pro rata*  
11 distribution payment equivalent to 80% of the goal under the terms of the oral employment  
12 agreement between Commisso and the Firm.

13 24. On January 3, 2012, Commisso sent Thomas another e-mail following up on their  
14 November 28, 2011, meeting and December 14, 2011, telephone call. Thomas responded on  
15 January 5, 2012, and promised to get back to Commisso the next week; however, Thomas did  
16 not do so.

17 25. The week of January 16, 2012, Henri contacted Commisso. Henri said that  
18 "everyone" was "happy with Commisso's work," that there were no issues, and that "everyone"  
19 agreed that they would like to send more work to Commisso.

20 26. On or about February 9, 2012, Commisso left Thomas a voicemail again  
21 inquiring about the status of Commisso's distribution. Thomas responded by e-mail and  
22 promised to call Commisso on February 20, 2012. Thomas did not call.

23 27. On February 23, 2012, Commisso sent Thomas another follow-up e-mail  
24 concerning the 2010-2011 distribution payment and compensation rate for 2011-2012.

### 25 Commisso's Employment Ends

26 28. On February 27, 2012, Thomas and Commisso spoke by telephone. Contrary to  
27 the terms of the agreement between Commisso and the Thomas Whitelaw firm, Thomas said that  
28 the Firm would not pay Commisso any part of his 2010-2011 distribution. Commisso told



1 Thomas that this was a material change in the parties' agreement; that non-payment of the  
2 distribution was not what the parties had agreed to, and that non-payment of the distribution was  
3 neither fair nor reasonable. At this point, Thomas said that Commisso could accept this or that  
4 Commisso could "...go right now, we will take you off the website today, and you can file a  
5 claim." Shocked, Commisso said that he would get back to Thomas the following day. Thomas  
6 agreed.

7 29. On February 28, 2012, Commisso called Thomas to finish the prior day's  
8 conversation. But Thomas did not respond to this call. Instead, Henri returned Commisso's call.  
9 Henri said he wanted to "look at the numbers" and would get back to Commisso later that day.  
10 When Commisso and Henri spoke that afternoon, Henri, acting in his capacity as an agent of the  
11 Firm, said that the Firm would pay Commisso less than one-third of the distribution that it owed  
12 to him per the terms of the agreement. Commisso did not accept the Thomas Whitelaw firm's  
13 revised offer. When Commisso said "no," Henri responded "then pack your shit and get out  
14 now." Commisso hung up the phone, packed what things he could, and left the Thomas  
15 Whitelaw firm premises.

16 30. On March 9, 2012, Commisso wrote to the Firm requesting that the Firm (i) turn  
17 over his remaining personal electronically-stored information maintained on the Thomas  
18 Whitelaw firm's computer system; and (ii) to pay him his wages due. The Firm refused.  
19 Among the electronically-stored information wrongfully withheld by the Firm are writings that  
20 document the parties' agreement.

## 21 FIRST CAUSE OF ACTION

### 22 Breach of Contract

23 31. Commisso incorporates and realleges Paragraphs 1-30.

24 32. A valid and enforceable oral contract existed between Commisso and the Thomas  
25 Whitelaw firm for at-will employment.

26 33. Commisso has at all times performed the terms of the contract in the manner  
27 specified by the contract.

28 34. Defendants failed and refused, and continue to refuse, to tender performance as

1 required by the contract in that, on or about February 28, 2012, they refused to pay Commisso  
2 the money that they owed him.

3 35. Defendant's failure and refusal to perform its obligations under the contract has  
4 damaged Commisso; Commisso has suffered and continues to suffer damages in amount to be  
5 proved at trial but in excess of \$75,000.

## 6 **SECOND CAUSE OF ACTION**

### 7 **Labor Code Violations**

8 36. Commisso incorporates by reference and realleges Paragraphs 1-35 above.

9 37. On February 28, 2012, at the time that Defendants terminated Commisso's  
10 employment, Commisso had last been paid on February 1, 2012 and was owed wages for his  
11 work from 2010 to 2011 and for his performance from February 1, 2012 to February 28, 2012, in  
12 a total amount in excess of \$75,000 as provided for in the employment agreement.

13 38. At the time of termination, Defendants failed to pay Commisso any of the  
14 amounts due as set forth above. Defendants failure to pay the full amount due Commisso on  
15 termination violates the provisions of the California Labor Code sections 201 and 227.3. There  
16 is now due and owing to Commisso the sum of at least \$75,000. Defendants failed and refused,  
17 and continue to fail and refuse to pay the amount due.

18 39. Pursuant to California Labor Code section 218.5, Commisso requests that the  
19 Court award Commisso reasonable attorney's fees and costs incurred by him in this action.

20 40. Pursuant to Labor Code section 218.6, Commisso requests that the Court award  
21 Commisso interest on all due and unpaid wages, at the legal rate specified in California Civil  
22 Code section 3289(b), accruing from the date the wages were due and payable.

## 23 **THIRD CAUSE OF ACTION**

### 24 **Violation Labor Code Section 203**

25 41. Commisso incorporates by reference and realleges Paragraphs 1-40 above.

26 42. The Defendants' failure to pay wages, as alleged above, was willful in that  
27 Defendants knew they owed the wages to Commisso; Commisso made clear and straightforward  
28 demands for payment of wages highlighting the legal consequences for Defendants' continued



1 willful failure to do so, thus entitling Commisso to penalties under Labor Code section 203,  
2 which provides that an employee's wages shall continue as a penalty until paid or for a period of  
3 up to 30 days from the time they were due whichever period is shorter.

4 43. Defendants failed to pay Commisso the sum due him at the time of termination  
5 and have failed to pay those sums for more than 30 days thereafter. Pursuant to the provisions of  
6 California Labor Code section 203, Commisso is entitled to a penalty in the amount of \$10,000,  
7 which amount is the product of his daily rate multiplied by 30 days.

8 **JURY DEMAND**

9 Plaintiff, Jeffrey V. Commisso, demands a trial by jury in this matter.


10 **PRAYER**

11 WHEREFOR, Commisso prays for judgment against Defendants and each of them as follows:

- 12 1. For damages for breach of contract according to proof;  
13 2. For interest on that amount from February 28, 2012;  
14 3. For penalties pursuant to California Labor Code;  
15 4. For reasonable attorney's fees incurred by Commisso;  
16 5. For costs of suit incurred by Commisso; and  
17 6. For such other and further relief as the Court deems proper.

18 November 15, 2012

HIGA & GIPSON, LLP

21 By   
22 RONNIE R. GIPSON JR.  
23 Attorneys for Jeffrey V. Commisso